92-1719

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MALONE SERVICE COMPANY,
ARTHUR MALONE, and
LARRY MALONE,
Petitioners,
v.
THE STATE OF TEXAS,
Respondent.

Petition For Writ Of Certiorari To
The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Once a person, not a member of a suspect class, makes a prima facie case of discriminatory enforcement of a penal statute by the State, is the Equal Protection Clause of the Fourteenth Amendment of the Constitution violated by the state court's additional requirement that the victim establish that the discriminatory enforcement resulted in a direct benefit to the State?

2. Whether a person claiming that he is the victim of discriminatory enforcement by the State, in violation of his right to equal protection under the Fourteenth Amendment of the Constitution, meets his burden of proof by showing intentional discrimination pursuant to an invidious, arbitrary or irrational classification scheme?

3. Whether a court may exclude evidence of the nature and extent of penalty actions in similar cases, including amounts assessed, as well as inaction by the State, and evidence of the basis for the favored treatment of persons similarly situated, when the evidence tends to establish that the defendant was improperly singled out for prosecution and the evidence is necessary to prove discriminatory enforcement in violation of the rights accorded under the Equal Protection Clause of the Fourteenth Amendment of the Constitution?

LIST OF ALL PARTIES

Petitioners, Malone Service Company, Arthur Malone, and Larry Malone, were defendants in the district court, appellants in the Court of Appeals for the 14th Judicial District Court of Texas, and respondents in the Supreme Court of Texas.

Respondent, State of Texas, was the plaintiff in the district court, appellee in the Court of Appeals for the 14th Judicial District Court of Texas, and petitioner in the Supreme Court of Texas.

Malone Company, Malone Trucking Company, Dan Malone, Paul Malone, and Paul Wayne Malone, additional defendants in the district court, received an instructed verdict from the trial court in their favor from which no appeal was taken.

Malone Company is the parent corporation of Petitioner, Malone Service Company and defendant, Malone Trucking Company.

ABBREVIATIONS USED

A -	Appendix
DX -	Defendants' Exhibit
Gulf Coast -	Gulf Coast Waste Disposal Authority
Malone -	Malone Service Company
SF -	Statement of Facts of the case at bar
State -	State of Texas
TR -	Transcript of the case at bar
TRS -	Supplemental transcript of the case at bar

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Petitioners,

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THE STATE OF TEXAS,
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Petition For Writ Of Certiorari
To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Finding that the trial court improperly excluded persuasive evidence of discriminatory enforcement in violation of the Equal Protection Clause of the United States Constitution, the Fourteenth Court of Appeals of Texas reversed the judgment of the trial court and remanded the case for retrial. *Malone Service Co. v. Texas*, 804 S.W.2d

174 (Tex. Ct. App. 1991). The opinion is attached at A-16a - 20a.

The Supreme Court of Texas reversed the opinion of the court of appeals and remanded the case for consideration of additional points of error not previously ruled on by the court of appeals. *Texas v. Malone Service Co.*, 829 S.W.2d 763 (Tex. 1992). The opinion is attached at A-1a - 8a.

JURISDICTION

The Supreme Court of Texas rendered its opinion on April 29, 1992. Petitioners were granted a timely extension within which to file a motion for rehearing. Petitioners' motion for rehearing, filed on May 29, 1992, was denied on June 17, 1992. The order is attached at A-21a.

This petition for certiorari was filed with the Clerk of this Court within 90 days of the denial of motion for rehearing.

This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS APPLICABLE

This case involves the Equal Protection Clause of the Fourteenth Amendment of the Constitution which provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

By its suit, the State of Texas ("State") sought civil penalties for alleged violations of the Texas Water Code and Solid Waste Disposal Act against Malone Service Company, Malone Trucking Company, Malone Company, Larry Malone, Arthur Malone, Paul Malone, Dan Malone and Paul Wayne Malone. (TR 2) Among other defenses, the Defendants asserted that the State had intentionally discriminated against them in favor of Gulf Coast Waste Disposal Authority ("Gulf Coast") and the customers and investors of Gulf Coast in violation of the United States Constitution. (TR 16-21)

Gulf Coast is a governmental agency and political subdivision of the State of Texas created by the Texas Legislature in 1969, under the Texas Constitution, Article 16, Section 59. *See* Tex. Rev. Stat. Ann. art. 7621d-2 (1971); (SF 829-32, 1412-13, 1429) The stated statutory purpose of Gulf Coast is to develop and effectuate a regional water quality management program in Chambers, Galveston, and Harris counties. Malone Service Company ("Malone") is a private company in the business of waste disposal and is a direct competitor of Gulf Coast. A-18a; *Malone Service Co. v. Texas*, 804 S.W.2d 174, 176 (Tex. Ct. App. 1991); (SF 830, 1386-87) Gulf Coast operates a facility that adjoins Malone in Galveston County, Texas. (SF 78-80, 829-30)

Gulf Coast has stated that it is within its purpose to own every waste treatment facility in its jurisdiction. (SF 1386-87) In fact, Jack Davis, the general manager for Gulf Coast, stated that Gulf Coast had the authority to acquire Malone. (SF 1388)

During trial, Petitioners offered two categories of significant documentation to establish Malone's defense of discriminatory enforcement. All offered documents were business records of the State or Gulf Coast. First, Petitioners offered the State's enforcement log which disclosed the amount of penalties that had been assessed and collected by the State against similarly situated companies. (Agreed stipulation by the parties filed with the court of appeals (the "Agreed Stipulation"), Offered DX 45) The second set of documents offered, revealed the identity of the customers and investors of Gulf Coast. (SF 1692-1700; Offered DX 79, 259, 260, 261, 274, 275, 26, 283, 284, 285) This evidence was offered in connection with an exhibit consisting of a list of large and small polluters in Harris and Galveston Counties. This list was published by the Texas Water Commission, a state agency, and compared polluters by degree of contamination. (DX 1) The benchmark for the comparative analysis of polluters was Amoco's admitted contamination of 750,000 barrels of benzene in the groundwater which covered up to 100 acres. (SF 274-75, 678, 966, DX 1) Malone Service Company was identified by the State as having contamination that was small. (DX 1) The following chart summarizes the excluded evidence of the lack of State enforcement action against companies identified as "large" contaminators who were also investors or customers of the State agency Gulf Coast:

Known Major Polluters	Customer/Investor of Gulf Coast	Enforcement Penalty Amount
Amoco	Yes	0.00
Arco-Central Plant	Yes	No enforcement
Crown Central	Yes	No enforcement
Hill Petroleum	Yes	0.00
Shell	Yes	0.00
Union Carbide OPDA	Yes	0.00

(DX 1, Offered DX 45, SF 1692-1700, DX 79, 259, 260, 261, 274, 275, 283, 284, 285)

The trial court excluded the customer/investor records in their entirety (SF 1692-1700) and admitted the enforcement logs with all penalty amounts excised. (DX 45) The trial court's admitting of the excised enforcement log allowed the "evidence" of enforcement while excluding the proof of the actual penalty amounts assessed by the State. The jury was not informed that no real enforcement was being taken against the large polluters that enjoyed the status of customers and investors of Gulf Coast.

Without the benefit of any evidence of the extent of the enforcement against other similarly situated persons, specifically Gulf Coast's customers/investors that were large polluters, the jury found against the Petitioners on their claim of discriminatory enforcement. (TR 1174) The trial court signed a judgment assessing penalties against Malone Service Company for $2,403,900.00, Arthur Malone for $627,000.00 and Larry Malone for $22,000.00. (TRS 2-14) The trial court instructed a verdict in favor of Malone Company, Malone Trucking Company, Paul Wayne Malone, Paul Malone, and Dan Malone. (*See* TRS 2-14)

The court of appeals reversed holding that, while Petitioners' defense was rejected by the jury, it did so without "persuasive evidence regarding the true impact of the government's enforcement actions against other companies similarly situated." A-20a; 804 S.W.2d at 176-77. The court of appeals found that the offered evidence showed that "(1) six of Gulf Coast's customers and investors were 'large' polluters, (2) the State took enforcement action against only four of them, and (3) no penalties were assessed against those four." A-18a; 804 S.W.2d at 176. The court of appeals further recognized that "[t]he enforcement log as admitted created a misleading impression" and the log "should have been admitted to give the jury a more complete picture in which to judge [Petitioners'] defense" that the State had intentionally discriminated against them in the enforcement of the State's regulations. A-20a; 804 S.W.2d at 176-77.

The State appealed the court of appeal's decision to the Texas supreme court. The supreme court agreed with the court of appeals that the offered evidence tended to support the allegation that Petitioners had been singled out for prosecution while others similarly situated and committing the same acts had not. A-6a; *Texas v. Malone Service Company*, 829 S.W.2d 763, 767 (Tex. 1992). The court offered no rational justification for any discrimination in favor of Gulf Coast and its customer investors. Nevertheless, the Texas supreme court held that, since Malone offered no evidence that the benefits to Gulf Coast would flow directly to the State or that enforcement was based upon race, religion, or any other impermissible considerations, the evidence was properly excluded. A-7a; 829 S.W.2d at 767. The court indicated that, as a matter of law, no benefits could flow directly to the State from Gulf Coast since all funds held by Gulf Coast must be placed in private banks instead of any State of Texas general fund. A-

7a, f.n. 7; 829 S.W.2d at 767 f.n. 7. Apparently concluding that proof of a direct benefit to the State's general fund was necessary to establish the improper motivation necessary to prove purposeful discriminatory enforcement, the court held that the evidence was properly excluded. *See id.* The Texas supreme court reversed the judgment of the court of appeals and remanded the cause for consideration of the points of error not yet reached. A-8a; 829 S.W.2d at 767. Petitioners' motion for rehearing was denied without opinion on June 17, 1992. A-21a.

REASONS FOR GRANTING THE PETITION

1. The holding by the Supreme Court of Texas that, despite a showing of discriminatory enforcement, the victim's rights afforded under the Equal Protection Clause are not violated, unless the discrimination results in a direct benefit to the State, is contrary to the decisions of this Court and the Circuit Courts of Appeal.

The Fourteenth Amendment to the Constitution commands the States that it shall not "deny to any person within its jurisdiction the equal protection of the laws." Equal protection requires that the State not engage in purposeful discrimination in the prosecution of offenders of its laws. *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). The issue to be decided in this action is whether a defendant who claims that he was intentionally singled out for prosecution by the State as the result of an arbitrary or irrational classification must show that the State directly benefitted by the classification scheme. The Supreme Court of Texas' holding that proof of a direct benefit was required by a non-suspect class defendant, is not in accord with the rights afforded by the Equal Protection Clause and directly conflicts with decisions of this Court and of the federal courts of appeal.

The Equal Protection Clause mandates that the States treat all persons similarly situated alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The general rule is that any classification by a State will be sustained if it is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. When the State classifies by race, alienage, national origin, or personal rights protected by the Constitution, the classification is suspect and subject to strict scrutiny. *Id.* The suspect classification will only be sustained if it is suitably tailored to serve a compelling state interest. *Id.* If the classification is based upon gender then a heightened review is applied and the classification must be substantially related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440-41, 105 S.Ct. 3254. In any event, this Court has clearly articulated that no classification by a State can pass constitutional muster pursuant to the Equal Protection Clause if the classification is arbitrary and irrational. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 57, 83, 108 S.Ct. 1645, 1653, 100 L.Ed.2d 48 (1988); *See also Mahone v. Addicks Utility District of Harris Co.*, 836 F.2d 921 (5th Cir. 1988).

An improper classification by a State can occur even if the statute is fair on its face. In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1004, 30 L.Ed. 220 (1886) this Court held that a State may not apply a valid statute in a manner that discriminates on the basis of race with no justification. The Court stated that:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances,

> material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 118 U.S. 373-74, 6 S.Ct. at 1073.

When these general principles of equal protection are applied to determine the constitutionality of selective prosecution, this Court has stated that the State denies equal protection if its enforcement has a discriminatory impact and the enforcement was motivated by a discriminatory purpose. *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531. Specifically, the decision to prosecute may not be "deliberately based upon a unjustifiable standard such as race, religion, or *other arbitrary classification*." *Id.*; *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962) (Emphasis added). Accordingly, a discriminatory purpose is established if the decision to prosecute is based upon *any* deliberate arbitrary classification. This interpretation is consistent with the Court's holding that equal protection prohibits a State from making invidious, arbitrary or irrational classifications. *Bankers Life*, 486 U.S. at 83, 108 S.Ct. at 1653, *City of Cleburne*, 473 U.S. at 450, 105 S.Ct. at 3260.

In this case, however, the Supreme Court of Texas imposed an additional hurdle for persons claiming selective prosecution in violation of their right to equal protection. The holding of the Texas supreme court requires that victims of discriminatory enforcement, that are not members of a suspect class, must further establish that the State directly benefitted by the classification scheme. A-7a; *Texas v. Malone Service Co.*, 829 S.W.2d 763, 767 (Tex. 1992). The supreme court stated that Petitioners failed to establish a direct benefit to the State, because no evidence was submitted that the general treasury of the State benefitted by the scheme. A-7a, f.n. 7; 829 S.W.2d at 767, f.n. 7.

According to the supreme court of Texas' holding, the State may purposefully discriminate, in a non-suspect class case, pursuant to an invidious, arbitrary, and irrational classification scheme, so long as the classification does not provide direct benefits to the State that result in a financial benefit to the State's general treasury.

The Texas supreme court's holding effectuates a complete abrogation of Petitioners' constitutional right to equal protection and is in conflict with the clear directives of this Court. The Texas supreme court's decision has the force of sanctioning arbitrary and irrational classifications of the State so long as the State shows the classification did not result in a direct benefit to the State's general treasury. Such a conclusion is in direct contradiction with this Court's pronouncements that no invidious, arbitrary, or irrational classification by a State may stand and that any such classification interferes with Petitioners' right to equal protection. *See, City of Cleburne*, 473 U.S. at 450, 105 S.Ct. at 3260, *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531. The Court should grant certiorari to resolve this conflict.

2. This case presents substantial, recurring questions involving the interpretation and application of the Equal Protection Clause to discriminatory enforcement by the government when the discriminatory enforcement is not based upon a recognized suspect criteria such as race or religion.

Deciding who to prosecute is a daily determination made by State and federal prosecutors and is of crucial importance to the citizens of this country. Although this Court has defined some broad limitations imposed by the Equal Protection Clause upon the decision to prosecute, this Court has never directly addressed the issues pertaining to invidious, arbitrary, and irrational discriminatory

enforcement, pursuant to criteria not based upon the exercise of constitutional rights or upon a suspect classification. This Court should direct that the States are prohibited from intentionally enforcing their regulations pursuant to any invidious, arbitrary, or irrational classification scheme, regardless of whether the classification causes an increase in a State's general revenue or treasury fund.

In addition, neither this Court nor any circuit court of appeals has provided the much needed direction concerning the admissibility of evidence establishing the degree of enforcement assessed or sought against similarly situated persons, or lack thereof, to the trier of fact in connection with the constitutional defense of discriminatory enforcement. Critical issues concerning the admissibility of various degrees of enforcement, including the amounts of civil penalties, when the evidence establishes that a person is the victim of discriminatory enforcement need to be addressed and resolved. Finally and perhaps most importantly, this Court must confront the question of allowing a State to interfere with a person's constitutional right to equal protection, by requiring proof of additional elements, in addition to demonstrating that the classification scheme is invidious, arbitrary, and irrational. This case of first impression presents each of these timely, crucial Constitutional issues, which by granting certiorari, this Court can resolve.

a. Whether the only requirement necessary to prove discriminatory enforcement in violation of the Equal Protection Clause, when it is not the result of a suspect criteria or the exercise of constitutional rights, is that there was intentional discrimination pursuant to an invidious, arbitrary, or irrational classification?

Significantly, both the court of appeals and the

Supreme Court of Texas found that Petitioners presented evidence that the State had engaged in selective enforcement. Despite this conclusion, the Texas supreme court held that improper motivation is only established by showing a direct benefit to the State. This holding imposes an additional burden never recognized or required by this Court or any other court.

Of vital importance is the fact that both appellate courts below agreed that the excluded evidence offered by Petitioners was "persuasive" proof that the State's motivation in this case was to intentionally enforce the laws against Petitioners and in favor of Gulf Coast and its customers/ investors. *See* A-6a, 829 S.W.2d at 767, A-20a, 804 S.W.2d at 176-77. The proffered evidence established that the State assessed no penalties, or took no action whatsoever, against persons that were large polluters if they were a customer or investor of Gulf Coast. On the other hand, if the person were a relatively minor polluter, (as classified by the State), but a competitor of the State agency Gulf Coast, such as Petitioners, then the immense powers and resources of the State were placed into action to seek and assess the maximum penalties to put the competitor out of business. A wholesale failure to enforce the regulations against large polluters, whose pollutants cover potentially hundreds of acres, merely because the polluter is willing to finance or support a State agency, is clearly irrational, arbitrary, and invidious discrimination of the worst character.

The Texas supreme court's holding insulates the State from any equal protection attack of this invidious, arbitrary and irrational discriminatory enforcement. The clear directives of this Court are that a denial of equal protection occurs if a State action arbitrary and irrationally classifies similarly situated people so that they are not treated alike even if the classification scheme is not based upon any

suspect criteria. *City of Cleburne*, 473 U.S. at 447-50, 105 S.Ct. at 3258-60. As reiterated by this Court in *Wayte*, no selective arbitrary enforcement is valid. *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531. The Texas supreme court's requirement that, in order to establish an improper purpose, the victim must adduce evidence that the State's motivation was based upon the expectation of a direct benefit to the State, is contrary to the Court's holding that any classification is a denial of equal protection if it is invidious, irrational, and arbitrary.

b. Whether evidence of enforcement, including the amount of penalties assessed and failure to enforce, and the basis for the favored treatment of those similarly situated, must be admitted when the defense of discriminatory enforcement is raised and the evidence is necessary not only to show that the defendant has been singled out for prosecution but to correct a misleading impression given to the trier of fact?

In this action, the excluded evidence demonstrated that while the State engaged in "enforcement action" against most polluters, that activity was a hollow effort. The State was allowed to conceal the fact that it's activity resulted in no genuine enforcement against similarly situated persons, who were, by the state's own documentation, responsible for massive pollution, but were shielded from assessment of civil penalties, because of their customer/investor relationship with the State agency, Gulf Coast. If these evidentiary rulings are allowed to stand, no evidence of the relative degree of enforcement may be considered by the trier of fact. This enables the State to foster, as it did in this case, the false impression to the trier of fact that the State's own evidence establishes that meaningful enforcement was occurring, when in fact it was not.

Evidence of the lack of enforcement and the fact that no civil penalties were assessed or collected against similarly situated persons, was critical to prove Petitioners' equal protection defense that similarly situated persons were not being treated alike. The evidence of the identity of the customers/investors of Gulf Coast was the essential last piece to the discriminatory puzzle. The defense of purposeful discriminatory enforcement is meaningless, if the victimized person is prohibited from introducing evidence in support of the defense. Neither this Court nor any circuit court of appeals has addressed the issue of the admissibility of the nature and degree of enforcement against similar situated persons when the evidence shows selective enforcement. This Court should grant certiorari to determine whether a court may properly exclude evidence of civil penalties assessed or collected in other actions, and evidence establishing the identity of similarly situated companies who comprise the favored class, when that evidence is critical to the defense of discriminatory enforcement.

CONCLUSION

This case presents several important constitutional issues and questions of first impression. The Supreme Court of Texas has imposed new restraints and burdens upon a persons right to equal protection under the United States Constitution. The Court should grant certiorari to determine the scope of a citizen's right to equal protection and the type of evidence that may be used to establish invidious, arbitrary, or irrational government enforcement action, when the victim

is not a member of a suspect class.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TEXAS

No. D-0863

THE STATE OF TEXAS, PETITIONER
v.
MALONE SERVICE COMPANY, ARTHUR LEE MALONE AND LARRY MALONE, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

OPINION

This civil environmental enforcement action presents evidentiary issues relating to the defense of discriminatory enforcement. The trial court excluded evidence of penalties listed within an enforcement log of the Texas Water Commission. The court of appeals reversed and remanded, holding that the evidence should have been admitted. 804 S.W.2d 174. We reverse the judgment of the court of appeals.

Malone Service Company operates a hazardous waste disposal plant in Galveston County. Before 1977, Malone legally used a large unlined earthen pit for the receipt of waste. In August, 1977, however, the Texas Department of

Water Resources issued an order amending Malone's waste disposal permit to provide for the installation of a concrete separator system to divide waste into aqueous, organic, and solid phases. The order also stated:

> The company shall discontinue use of the earthen pit upon completion of the separator and close-out the earthen pit as described in the application within 18 months after issuance of this Amendment.

Despite continued enforcement efforts by the Department, Malone failed to cease its use of the earthen pit, even after the eighteen-month deadline had been extended. Finally, in early 1983, Malone entered into a Compliance Agreement providing that, so long as Malone closed the earthen pit within one year, statutory enforcement proceedings would be withheld.[1]

The State of Texas, acting upon request of the Texas Water Commission,[2] brought this suit against Malone and others (collectively "Malone") in 1986. *See* Tex. Health & Safety Code § 361.224(b). The State alleged that, despite the 1977 order and the 1983 Compliance Agreement, Malone continued to discharge hazardous waste into the earthen pit in violation of the Texas Solid Waste Disposal Act, Tex. Health & Safety Code § 361.001, and the Texas Injection Well Act, Texas Water Code § 27.001. In its defense,

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[1]*See* Texas Water Code § 26.123; Tex. Rev. Civ. Stat. Ann. art. 4477-7 (Vernon Supp. 1986), *repealed by* Acts 1989, 71st Leg., ch. 678, § 13(1), eff. Sept. 1, 1989; *now see* Tex. Health & Safety Code § 361.001.

[2]The Texas Water Commission is the successor agency to the Texas Department of Water Resources. *See* Texas Water Code Ann. § 5.001, *amended by* Acts 1985, 69th Leg., ch. 795, § 1.001, eff. Sept. 1, 1985.

Malone asserted a claim of discriminatory enforcement, contending that the State's enforcement action was motivated solely to benefit one of Malone's competitors, the Gulf Coast Waste Disposal Authority (Gulf Coast).[3]

At trial, Malone sought to support its claim of discriminatory enforcement with an enforcement log generated by the Commission's computers. The log, dated October 26, 1988, lists the names of hundreds of companies against which the Commission had some type of enforcement activity under the Solid Waste Disposal Act. Six of these companies, Malone contends, were customers and investors of Gulf Coast, and had been classified by the Commission as large polluters. Malone claims that the log shows the Commission had taken enforcement action against only four of the six companies, and had assessed no penalties in any of those cases.

The State objected and requested that the log be admitted with certain columns excised; namely, the columns styled "Penalty Assessed," "Penalty Collected," and "Scheduled Compliance." The trial court sustained the objection and admitted the log with the disputed columns removed.

The trial court did not, however, bar all evidence relating to enforcement proceedings against Malone's competitors. The court permitted Malone's counsel to go through the admitted portions of the enforcement log and

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[3]The Gulf Coast Waste Disposal Authority is a political subdivision created by the Texas Legislature in 1969 under Tex. Const. art. 16, § 59. *See* Gulf Coast Waste Disposal Authority Act, ch. 409, 1969 Tex. Gen. Laws 1336. Gulf Coast has the power to develop and effectuate a regional water quality management program in Chambers, Galveston, and Harris counties.

other documents in order to elicit testimony from two Water Commission employees. This testimony revealed that all six of the companies in question had been subject to enforcement in some manner short of suit. The two employees also testified that the State had shut down none of these six companies, and that no officers or directors of the six companies had been individually fined for violations of State environmental statutes.

On the basis of the evidence presented, the jury found that the Commission had not intentionally discriminated in the enforcement of its regulations against Malone. Passing on the Commission's allegations, the jury found that Malone had continued to use the earthen pit on 418 occasions after September 19, 1979, and that Malone had contaminated ground water by discharging or causing seepage of solid waste from the earthen pit on a total of 3,495 occasions. For each of the instances in which Malone had used the pit, the jury chose to assess the maximum civil penalty of $5,000. *See* Tex. Water Code § 27.101. The trial court rendered judgment on the jury verdict against Malone in the amount of 2,403,900; against Arthur Lee Malone, the company's president, in the amount of $627,000; and against Larry Malone, the company's plant manager, in the amount of $22,000.

On appeal, Malone argued, among other things, that the trial court had erred in excluding the evidence of penalties assessed against Malone's competitors. The court of appeals agreed, reasoning that the excised columns should have been admitted in support of Malone's defense of discriminatory enforcement. 804 S.W.2d at 174.

The defense of discriminatory enforcement is based on the constitutional guarantee of equal protection under the law. U.S. Const. amend. XIV, § 2; Tex. Const. art. I, § 3;

see generally Yick Wo v. Hopkins, 118 U.S. 356 (1886). Though the defense originated in the context of criminal prosecutions, the governing principles also apply to civil proceedings involving state agencies. *See Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 71-76, 161 S.W.2d 1022, 1025-28 (1942); *Colorado River W. Ry. v. Texas & New Orleans R.R. Co.*, 283 S.W.2d 768, 776-77 (Tex. Civ. App.--Austin 1955, writ ref'd n.r.e.).[4]

To establish a claim of discriminatory enforcement, a defendant must first show that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not. *See United States v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *Wolf v. State*, 661 S.W.2d 765, 766 (Tex. App.--Fort Worth 1983, writ ref'd n.r.e.). It is not sufficient, however, to show that the law has been enforced against some and not others. The defendant must also show that the government has purposefully discriminated on the basis of such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. *See Rice*, 659 F.2d at 526; *Wolf*, 661 S.W.2d at 766; *see also Super-X Drugs of Texas, Inc. v. State*, 505 S.W.2d 333, 336 (Tex. Civ. App.--Houston [14th Dist.] 1974, no writ).

In deciding whether to admit evidence in support of a discriminatory enforcement claim, a trial court must apply

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[4]In the criminal context, the defense is generally known as selective prosecution. *See, e.g., Wayte v. U.S.*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed. 2d 547 (1985); *Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980). In both the civil and the criminal contexts, though, the same equal protection principles apply. *See generally* Kenneth C. Davis, ADMINISTRATIVE LAW TREATISE § 9:7 (2nd ed. 1979 & 1989 supp.).

the rules of evidence in light of the above requirements.[5] Evidence will generally be relevant to the defense of discriminatory enforcement if it tends to show either that the government has singled the defendant out for prosecution or that the government has acted on the basis of impermissible considerations. *See* Tex. R. Evid. 401. Even if the evidence is relevant, however, the trial court may exclude it if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. Tex. R. Evid. 403.

In the present case, Malone sought to establish that the State had discriminated by taking strong enforcement action against Malone while taking little or no action against companies associated with the Gulf Coast Waste Disposal Authority. This assertion, if true, would tend to support the allegation that Malone has been singled out for prosecution while others similarly situated and committing the same acts have not. It would not, however, constitute a showing that the government has purposefully discriminated on the basis of impermissible considerations.

The complexity of regulatory enforcement requires that a state agency retain broad discretion in carrying out its statutory functions. *See Heckler v. Chaney*, 470 U.S. 821,

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[5]Neither Malone nor the State argues that the trial court erred in submitting the discriminatory enforcement issue to the jury; thus, we do not decide that question. We note, however, that at least some federal courts have assigned the issue to the judge, *see United States v. Berrigan*, 482 F.2d 171, 174-76 (3rd Cir. 1973), while at least one Texas court has left the matter to the jury, *see Wolf v. State*, 661 S.W.2d 765, 766 (Tex. App.--Fort Worth 1983, writ ref'd n.r.e.).

831 (1985).[6] Thus, a discriminatory purpose is never presumed; rather, the party asserting the defense of discriminatory enforcement must show a clear intentional discrimination in enforcement of the statute. *See S.S. Kresge Co. v. State*, 546 S.W.2d 928, 930 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.); *see also Enntex Oil & Gas Co. v. State*, 560 S.W.2d 494, 497-98 (Tex. App.--Texarkana 1977, no writ); *Super-X Drugs*, 505 S.W.2d at 336. Even when enforcement has been sought for selfish reasons by a private entity, the state's actions are presumptively non-discriminatory; the motives of the private entity are not imputed to the state. *See Retail Merchants Ass'n of Houston, Inc. v. Handy Dan Hardware, Inc.*, 696 S.W.2d 44, 53 (Tex. App.--Houston [1st Dist.] 1985, no writ); *S.S. Kresge Co.*, 546 S.W.2d at 930.

Malone offered no evidence suggesting that benefits to Gulf Coast would flow directly to the State.[7] Nor did Malone offer any evidence suggesting that the State's action against Malone was based on race, religion, or any other impermissible considerations. Thus, as a matter of law, the evidence offered by Malone failed to establish the defense of

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[6]"[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing."

[7]Under state law, all funds held by Gulf Coast must be placed either in depository banks designated by Gulf Coast's board of directors or in a trustee bank named in a trust indenture. Gulf Coast Waste Disposal Authority Act, ch. 409, § 4.08, 1969 Tex. Gen. Laws 1336, 1350. No funds received by Gulf Coast flow directly to the State.

discriminatory enforcement.

We conclude that the trial court did not abuse its discretion in excluding the penalty amounts in the enforcement log. We reverse the judgment of the court of appeals and remand this cause to that court for consideration of points not yet reached.

Oscar H. Mauzy,
Justice

Concurring opinion by Justice Gonzalez.

OPINION DELIVERED: April 29, 1992

IN THE SUPREME COURT OF TEXAS

No. D-0863

THE STATE OF TEXAS, PETITIONER
v.
MALONE SERVICE COMPANY, ARTHUR LEE MALONE AND LARRY MALONE, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

CONCURRING OPINION

I concur in the Court's judgment but write separately to offer some guidelines regarding the use of the defense of selective prosecution in regulatory actions.

There are many external factors over which an agency has no control that influence the outcomes of regulatory decisions. Therefore, it is egregiously inequitable to allow a defendant to force the State of Texas to justify a penalty it seeks in a pending action by explaining the penalties imposed in earlier unrelated cases. Allowing a defendant to employ such a defense without first requiring evidence that the prosecution used impermissible criteria (such as race or

religion) would be unprecedented and bad policy.[1]

I am concerned that without this safeguard, future defendants will invoke this defense, regardless of merit, to divert the trier of fact's attention from the real issue of whether the defendant violated an environmental regulation. The State should not have to validate any result reached in prior cases unless a concrete basis exists for doubting the State's good faith in bringing the current enforcement action.

The State Water Commission maintains an "enforcement log" with columns that list the companies that were the subject of the enforcement, the nature of the claimed violation, the penalties assessed, and the penalties collected. Many of the entries showed "0.00" as the amount of penalty assessed or collected. The trial court admitted the log into evidence except for a redaction of the columns for penalties assessed or collected. Nothing in the record shows whether the actions listed in the log were pending or adjudicated matters, or whether penalties were assessed by a jury, judge, or settlement.

"Selective prosecution," a recognized defense to criminal charges, is properly invoked when the prosecution

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[1]It is unfair to require the State to "re-try" the previous cases by having to explain the different facts and circumstances that justify the lesser penalties. For example, in the case now before us, the jury assessed a fine of $5,000 per violation against Malone Service Co., a lesser amount against Arthur Malone, and even a lesser amount against Larry Malone. The judgment rendered in this case was for $2,403,900 against Malone Service Co., $627,000 against Arthur Lee Malone, and a fine of $22,000 against Larry Malone. Presumably, the jury assessed different fines based on their assessment of respective culpability. I believe this evidence should not be admissible in future cases of selective prosecution; for why should the State be required to justify decisions it did not make?

based its action on an impermissible criterion such as race, religion, or the exercise of protected statutory and constitutional rights. *See, e.g., Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Goodwin*, 457 U.S. 368, 372 (1982). It requires proof of:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
>
> (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." * * * Mere "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." [Citations omitted.]

Gawlick v. State, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980), *quoting United States v. Ojala*, 544 F.2d 940, 943 (8th Cir. 1976); *see also Armendariz v. State*, 529 S.W.2d 525, 527 (Tex. Crim. App. 1975); *Railroad Comm'n v. Shell Oil Co.*, 161 S.W.2d 1022, 1029 (Tex. 1942) (agency may not discriminate in the enforcement of its regulations).

Without proof of discriminatory intent, the fact that violators have received different penalties is probative of nothing other than the truism that different tribunals (judges or juries) respond differently to similar facts because of

factors completely unrelated to the prosecutor's motives. These factors include: (1) the strength or weakness of the facts of the case; (2) the experience, wisdom, and advocacy skills of the lawyers on both sides of the case; and (3) the differences among community values and attitudes. For example, a tribunal may be more strict on a polluter in **their** back yard while being more tolerant of a polluter in **your** back yard.

Courts always presume that a prosecution was brought in good faith and in a nondiscriminatory fashion for the purpose of bringing violators to justice. *See, e.g., Gawlik*, 608 S.W.2d at 673; *accord United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973)(en banc). And they recognize that prosecutors have broad discretion in choosing which cases to prosecute. If the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether to prosecute and what charge to file generally rests entirely within his or her discretion. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Callaway v. State*, 818 S.W.2d 816, 838 (Tex. App.--Amarillo 1991, pet. ref'd); *see also Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987)(part of the exclusive prosecutorial function is exercise of discretion in preparation of cases for trial).

As the Court recognizes, a state agency's need for discretion in regulatory enforcement is even more compelling than that required in a criminal context. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As Associate Justice Scalia has noted, "[e]stablishing environmental requirements is one thing; enforcing them is something else. Perhaps the greatest degree of agency discretion is involved in deciding whether to assess a penalty against a particular polluter. ..." Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUSTON L. REV. 97, 105 (1987).

If a defendant has an unfettered right to put into evidence facially differing treatment, then the State would be forced to "re-try" unrelated cases before resolving the instant enforcement action. Moreover, evidence of differing outcomes in unrelated cases, though patently without relevance, could cause incalculable prejudice. The law contemplates as relevant that evidence which is personal to the accused. Comparisons of fines assessed in other cases does not satisfy this standard.

The defendant's arguments here are analogous to a defendant in a criminal case trying to show the relatively light sentences given other persons charged with the same crime. For example, in a capital murder case, the defendant appealed to the Court of Criminal Appeals and complained that it was error for the trial court to exclude the prior convictions of a co-defendant who had testified against him. The court wrote:

> [W]e do not see how the conviction and punishment of a co-defendant could mitigate appellant's culpability in the crime. Each defendant should be judged by his own conduct and participation and by his own circumstances. If evidence of a co-defendant's convictions and punishment were admissible, why not the convictions in all other capital murders and the punishment in those cases? ... The law contemplates evidence personal to the accused, not comparisons with the convictions and punishments of other defendants.

Evans v. State, 656 S.W.2d 65, 67 (Tex. Crim. App. 1983); *see also Johnson v. State*, 477 So. 2d 196, 218 (Miss. 1985). Thus, I concur that the evidence in question, which is not

alleged to be tied to any impermissible prosecutorial criteria, such as race or religion, is irrelevant as a matter of law.

I recognize that the role of a jury in state civil enforcement actions is distinguishable from a federal criminal prosecution, and that at some point in a civil action it is desirable to have a jury decide issues of fact concerning the defense.[2] I would hold that evidence of the enforcement in unrelated cases is inadmissible without first establishing as a predicate a *prima facie* case of selective enforcement. Upon motion of the State, either by a pretrial evidentiary hearing or *voir dire* outside the presence of the jury, the trial court should make a determination whether the defendant will be able to make a *prima facie* showing of selective enforcement for discriminatory reasons.

With this opinion, the focus of the selective prosecution defense will continue to be the **motive** of the prosecutor or agency that brought the action and nothing else. In the present case, the defendant wanted to show not that the agency failed to enforce the regulations against others, but that other polluters had been assessed insubstantial penalties in previous environmental enforcement actions. The defendant did not offer any evidence that the prosecution brought against him was based on race, religion, or any other impermissible criteria. Thus, I concur with the

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[2]In federal court, the question of selective enforcement is not even a jury issue, because it does not go to guilt or innocence, but to the right of the court to conduct the trial, a matter outside the province of the jury. *See United States v. Berrigan*, 482 F.2d 171, 174-76 (3rd Cir. 1973). The issue is decided by a pre-trial hearing. *Id.* at 177. But a pretrial hearing may not be necessary if the defendant's motion fails to allege facts sufficient to raise a reasonable doubt as to the prosecutor's purpose. Absent such a showing, the prosecution is presumed to have been brought in good faith and without discrimination. *United States v. Eklund*, 733 F.2d 1287, 1290-91 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985).

court's opinion and judgment.

Raul A. Gonzalez
Justice

OPINION DELIVERED: April 29, 1992

Reversed and Remanded and Opinion filed January 10, 1991.

THE STATE OF TEXAS

IN THE
FOURTEENTH COURT OF APPEALS

NO. A14-89-01132-CV

MALONE SERVICE COMPANY, ARTHUR LEE MALONE and LARRY MALONE,
Appellants
V.
THE STATE OF TEXAS,
Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 86CV0112

OPINION

At the request of the Texas Water Commission (TWC), the attorney general's office brought this environmental enforcement action against Malone Service Company (MSC), its president Arthur Malone, and plant manager Larry Malone, alleging groundwater contamination and unauthorized hazardous waste dumping into an earthen pit. Finding 418 violations of a permit that forbade use of the pit for hazardous waste disposal, a jury assessed MSC the

maximum penalty of $5,000 per violation. In addition, the jury assessed a penalty of $627,000 against Arthur Malone for personally participating in or directing each violation. Larry Malone was assessed $22,000 for personally participating in or directing forty-four of the violations. The trial court also awarded the State a judgment of $313,900 based on the jury's finding that MSC caused groundwater contamination by allowing waste to leak out of the earthen pit on 3,495 occasions. In seven points of error, appellants contend (1) the evidence is insufficient regarding either unauthorized use of the earthen pit or groundwater contamination, (2) liability may not be extended to parties who are not permit holders, (3) cumulative penalties may not exceed the maximum statutory punishment per violation, (4) the State's jury argument was improper, and (5) the trial court erred in excluding evidence supporting appellants' defense of discriminatory enforcement. We reverse and remand.

On August 17, 1977, the Texas Water Quality Board issued an order amending a deep well injection permit held by MSC. The amendment required that

> [a] concrete separator shall be constructed for pretreatment of the waste to replace the existing earthen pit and placed in service within nine months after issuance of the amendment. *The Company shall discontinue use of the earthen pit upon completion of the separator* and close-out the earthen pit as described in the application within 18 months after issuance of this Amendment. (emphasis added)

The Texas Department of Water Resources, predecessor agency of the TWC, twice extended the deadline, but on

September 19, 1979, it ordered MSC to cease receiving any waste materials into the earthen pit and to close the pit within nine months.

A number of current and former MSC employees testified that they continued to pump sludge into the pit, covertly. To conceal the activity from outsiders, they would write code phrases such as "pumping sludge ... *over the levy*" [sic] in their logbooks, and they shut down the pumps whenever inspectors came. When MSC entered into a compliance agreement with the State to close the pit with a tarpoleum, employees cut tears in the fabric so that they could continue to pump waste into the pit.

Jurors disbelieved MSC's claim that the only hazardous waste pumped into the pit was material that had been removed from the pit along with rainwater in an effort to clean the pit. They also rejected MSC's allegation that the State's suit against MSC was solely motivated to benefit a quasi-governmental agency, Gulf Coast Waste Disposal Authority, which was MSC's direct competitor. However, in point of error number four, appellants claim the trial court erred in excluding evidence relevant to their "equal protection" defense of discriminatory enforcement. U.S. CONST. amend. XIV; TEX. CONST. art. I, § 3. Specifically, MSC offered into evidence the State's enforcement log which showed, in part, that (1) six of Gulf Coast's customers and investors were "large" polluters, (2) the State took enforcement action against only four of them, and (3) no penalties were assessed against those four. Sustaining the State's objections that any reference to penalties assessed against other companies was not relevant or its prejudicial effects outweighed its probative value, the trial court admitted the enforcement log only after the penalty amounts were excised. Appellants contend that without "the final piece of the discriminatory enforcement puzzle," jurors were

misled: admitting information that enforcement action was taken against Gulf Coast customers and investors but excluding evidence revealing that no penalties were assessed against them resulted in a half-truth told to the jury. We agree.

"Equal protection" essentially ensures that all persons similarly situated be treated alike. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 932 (5th Cir. 1988). For example, the United States Supreme Court held long ago that an ordinance forbidding the operation of wooden laundries but enforced only against persons of Chinese descent is synonymous with a law forbidding only Chinese to operate wooden laundries. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Which is not to say that selective prosecution is necessarily the same as applying the law, with improper motive, to only one person or entity.

> A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases.

Falls v. Town of Dyer, Ind., 875 F.2d 146, 148 (7th Cir. 1989). Indeed, a defendant claiming discriminatory enforcement carries a heavy burden. First, he must make "a prima facie showing that he has been singled out for prosecution while other similarly situated and committing the same acts have not." *U.S. v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981). Second, he must show that the government's prosecution of him is "selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights." *U.S. v. Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978).

It may well be that to establish a precedent to compel compliance the State pursued MSC and not other companies because the case against MSC, with damaging testimony from employees, seemed the most winnable. Or it could be that exceptional enforcement appeared appropriate because of a blatant, intentional violation of conditions the company had agreed upon. But when jurors rejected appellants' defense that the water commission intentionally discriminated against MSC in the enforcement of its regulations, they did so without benefit of persuasive evidence regarding the true impact of the government's enforcement actions against other companies similarly situated to MSC. The enforcement log as admitted created a misleading impression that influenced the jurors' findings and probably motivated them to assess penalties far out of line with other offenders. The evidence should have been admitted to give the jury a more complete picture by which to judge appellants' defense. Therefore, we sustain appellants' fourth point of error.

Our disposition of the case on this ground makes it unnecessary to consider appellants' other contentions.

The judgment is reversed and the cause remanded.

/s/ J. Curtiss Brown
Chief Justice

Judgment rendered and Opinion filed January 10, 1991.

Panel consists of Chief Justice J. Curtiss Brown and Justices Junell and Murphy.

Publish - TEX. R. APP. P. 90

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

June 17, 1992

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RE: Case No. D-0863

Style: THE STATE OF TEXAS v. MALONE SERVICE COMPANY, ARTHUR LEE MALONE and LARRY MALONE

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

JOHN T. ADAMS, Clerk

by /s/ illegible
Courtland Crocker, Deputy